No. 12969

In the United States Court of Appeals for the Ninth Circuit

HARRY SIMMONDS, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

BRIEF FOR THE UNITED STATES, APPELLEE

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CITATIONS

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OPINION BELOW

The district court did not write an opinion. The issue of just compensation was determined by a jury whose verdict appears in the record[1] at page 69. Issues other than the value of the property were determined by the court acting without a jury and the findings of the court thereon are contained in its judgment (R. 74–87).[2] The order of the court finding on the number of acres and against appellant

[1] Reference to the Transcript of Record is herein indicated by "(R.)" and reference to the Reporter's Transcript of the Testimony is herein indicated by "(Tr.)."

[2] By stipulation of the parties filed December 14, 1950 (R. 71), findings of fact and conclusions of law, except as are contained in the Final Judgment as to Tract 7 and Tract 7, Parcel 2, the property here involved, were expressly waived.

on other issues reserved to the court for decision appears in the record at page 70.

JURISDICTION

Final judgment was entered in this case on December 14, 1950 (R. 74–87). The jurisdiction of the district court was invoked under 33 U. S. C. sec. 591 and 40 U. S. C. sec. 257. A motion for new trial filed December 20, 1950 (R. 90–91), was denied on February 13, 1951 (R. 94). Notice of appeal was filed on March 9, 1951 (R. 96–97). The jurisdiction of this Court is invoked under 28 U. S. C. 1291.

STATUTES INVOLVED

1. The Act of April 24, 1888, c. 194, 25 Stat. 94, 33 U. S. C. sec. 591, provides as follows:

> * * * That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: *Provided, however,* That when the owner of such land, right of way, or material shall fix a price for the same, which in the opinion of the Secretary of War, shall be reasonable, he may purchase the same at such price without further delay: *And provided further,* That the Secretary of War is

> hereby authorized to accept donations of lands or materials required for the maintenance of prosecution of such works.

2. California Civil Code (Chase 1947), sec. 830, provides:

> SEC. 830. Land Bordering Navigable Waters.—Except where the grant under which land is held indicates a different intent, the owner of the upland, when it borders on tidewater, takes to ordinary high water mark; when it borders on a navigable lake or stream, where there is no tide, the owner takes to the edge of the lake or stream, at low water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

QUESTIONS PRESENTED

1. Whether appellant showed any ground for overturning the determination of the Secretary of the Army that it is necessary and expedient to take the fee title to land being condemned by the United States for improvement of navigation and flood control.

2. Whether, in a condemnation proceeding where the evidence of value is conflicting, the compensation awarded by the verdict of the jury is within the range of the testimony and there is no substantial question as to the admissibility of evidence, the award will be set aside on appeal.

3. Whether the court's finding as to the acreage involved is clearly erroneous.

STATEMENT

On August 5, 1947, the United States filed a complaint in condemnation to acquire the right and ease-

ment for a period of 15 years to deposit spoil and other matter excavated in the improvement and maintenance of the Sacramento River Improvement Project on appellant's property designated as Tract No. 7 (R. 1–8).[3] Except for a small house built on piles (R. 67) the land is unimproved property (Br. 7). Thereafter the complaint was amended to provide for the commencing of the 15-year period on June 15, 1943 (R. 10).

By his answer appellant denied, *inter alia,* the authority of the United States to take, the necessity of the taking, the sufficiency of funds available, and the authority to pay just compensation, and that the use constituted a public use (R. 13–18). Appellant later amended his answer to further define the boundary of his tract (R. 21–22).

On August 11, 1948, a declaration of taking (R. 29–31) was filed by the United States in which the description of Tract No. 7 indicated the mean high-tide line as being the shore-line boundary of the tract and a second amendment to the complaint was filed in order that the description of Tract No. 7 would conform to that set forth in the declaration of taking (R. 24). The sum estimated to be just compensation for the taking of Tract No. 7 was $2,076.00 and a sum was deposited in the registry of the court which included that estimated amount. Judgment on the declaration of taking was entered by the court on August 12, 1948 (R. 33–36). In November 1948, at the re-

[3] The complaint also includes a tract designated as No. 8 which was held in different ownership and which is not involved in this appeal.

quest of the Secretary of the Army, a third amendment of the complaint was filed to change the estate taken in Tract No. 7 from an easement to the fee title (R. 44). An amendment to the declaration of taking was made increasing the sum estimated as just compensation to $4,500.00 and depositing the necessary additional funds into the registry of the court (R. 47–48). The judgment on the declaration of taking was amended accordingly (R. 49).

Appellant filed an answer to the third amendment to the complaint in which he alleged that it was unnecessary for the United States to condemn the fee title and that the taking was "without due process of law and in violation of the Fifth Amendment to the Constitution of the United States" (R. 50).

Pursuant to stipulation, on May 26, 1950, a fourth amendment to the complaint and a declaration of taking No. 2 were filed for the acquisition of additional land designated as Tract No. 7, Parcel 2, which was also then owned by the appellant (R. 56, 58–60). The sum estimated to be just compensation for parcel 2 was $2,060.00 and that further amount was deposited in the registry of the court (R. 59). Judgment on declaration of taking No. 2 was entered on May 26, 1950, vesting the fee simple title subject to certain easements not here pertinent in the United States (R. 61–63).

Appellant filed an answer to the fourth amendment to the complaint alleging, *inter alia,* that "it is unnecessary for the plaintiff to condemn the fee" of the property involved for the purposes set forth; that the taking is "without due process of law and in vio-

lation of the Fifth Amendment to the Constitution of the United States''; and that Tract No. 7, including Tract No. 7, Parcel 2, contained 21 acres of land (R. 64–66).

At a pretrial conference, counsel for appellant expressly waived proof of paragraphs one, three, and four of the complaint in condemnation (R. 107–108). The first paragraph of the complaint sets out the statutory authority for the suit (R. 1–2) and paragraphs three and four, respectively, contain allegations that the acquisition is for the public benefit and that there is sufficient funds available for the taking (R. 3).

After several continuances, the trial of Tract No. 7 and Tract No. 7, Parcel 2, was heard by the district court with a jury on October 23, 24, and 25, 1950. The amount of acreage condemned was in dispute. The Government offered to stipulate that it took 18.27 acres (Tr. 27) while the landowner claimed that the Government took 22.25 acres, 3.6 of which were under water and below or to the point of the low-water line of the Sacramento River (Tr. 3, 22, 26, 27). The district court reserved the issue of the amount of land taken for decision by the court (Tr. 26, 75, 409, Br. 12). The landowner's claim that the United States did not need the property condemned and that its action in taking the land was in bad faith were also reserved for determination by the court (R. 75–76, Br. 12).

The parties stipulated that the fair market value should be determined as of November 8, 1948, considering the physical condition it was in on October

21, 1944, and that there should be one award covering the compensation and damages for the taking of the property (R. 67). The landowner alleged that the highest and best use of the property condemned was commercial and industrial and that the property contained soil which could be sold "for the fertilization of growth of vegetation" (Tr. 60, 61). He valued the property at $20,000.00 per acre (Tr. 64). Other witnesses for the landowner valued the property at $3,500.00 per acre and $1,800.00 per acre, respectively (Tr. 131, 184). They also valued the small frame house on the premises at $2,500.00 and $2,000.00, respectively (Tr. 139, 184).

Witnesses on behalf of the Government, Messrs. Chris R. Jones and William Thielbar, testified that the highest and best use of the property was for summer recreation, i. e., the part-time rental of space to campers with auto trailers and to persons who desired to construct their own temporary buildings and pay a ground rental for the use of the property (Tr. 230, 317). Mr. Jones valued the property at $6,500.00 (Tr. 234). On an acreage basis this amounts to approximately $300.00 per acre, inasmuch as $1,000.00 was allowed for the little house (Tr. 234). Mr. Thielbar valued the property at $350.00 per acre [4] and the building at $500.00 (Tr. 305–306).

The jury returned its verdict finding the value of the property to be $375.00 per acre and the building

[4] Though the Reporter's Transcript of the Testimony indicates the answer of this witness as being "$50.00 an acre" (Tr. 305), reference to pages 338, 339, and 378 of the transcript will show that the valuation was $350.00 rather than $50.00 per acre.

to be $1,250.00 (R. 69). The court found the number of acres to be 18.27 as contended by the United States and it found against the defendant upon the other issues submitted to it (R. 70, 75–76, 77, 79, 80). Accordingly, final judgment was entered on December 14, 1950 (R. 74–87). The sum of $8,305.71, representing all sums and interest thereon which were awarded by that judgment, has been paid to the appellant (R. 98). The landowner's motion for a new trial filed December 20, 1950 (R. 90), was denied on February 13, 1951 (R. 95). This appeal followed.

ARGUMENT

I

The District Court's ruling that condemnation of fee title was properly authorized is clearly correct

Originally appellant objected to the taking of any interest in his property (R. 13–18). That position was abandoned, however, and the sole complaint now urged is that the taking of fee title rather than a lesser interest was not authorized. Thus, it is uncontroverted—and could not be—that the acquisition by condemnation of some interest in appellant's land for the purpose of improving navigation on the Sacramento River is a proper exercise of the federal power of eminent domain. The argument that a fee title could not be so condemned is plainly erroneous for several reasons.

Appellant's argument rests largely on the notion that the condemnation power may be exercised only for the purpose of physical use of the property by the Government and the title which may be taken is

limited by such physical use. While this may be the law of some states, the federal power of eminent domain is not so limited. Condemnation by the Federal Government is permissible wherever a proper federal purpose be served even though physically the land taken may be used by or even conveyed to private persons. *United States* v. *Marin,* 136 F. 2d 388 (C. A. 9, 1943); *United States* v. *243.22 Acres of Land, Etc.,* 129 F. 2d 678 (C. A. 2, 1942), certiorari denied *sub nom. Lambert* v. *United States,* 317 U. S. 698 (1943). In determining whether fee title or some lesser interest should be taken, the federal officers may properly take into account economic factors. As the court said in *United States ex rel. T. V. A.* v. *Welch,* 327 U. S. 546, 554 (1946): "The cost of public projects is a relevant element in all of them, and the Government, just as anyone else, is not required to proceed oblivious to elements of cost." Thus, fee title may be condemned in order to salvage the value of improvements which were placed upon land under a lease. *Old Dominion Co.* v. *United States,* 269 U. S. 55 (1925). And an easement for a railroad line may be legitimately extended for a period of time sufficient to liquidate the investment after the Government's need for the line has ceased. *United States* v. *State of New York,* 160 F. 2d 479 (C. A. 2, 1947), certiorari denied, 331 U. S. 832, rehearing denied, 331 U. S. 869. Appellant's idea (Br. 17) that the Government, in the instant case, could not condemn fee title for the incidental purpose of recouping, through enhancement of land value, some of the expense of dredging is a mistaken view of the federal law. Thus

the fact that the estate taken was changed from an easement to a fee, does not, as appellant argues (Br. 17), prove that only an easement could be taken.

Likewise, the contention that the Secretary of the Army has not exercised his administrative authority lacks merit. It was the request of the Secretary that led to the amendment of the condemnation complaint and an amended declaration of taking was signed by the Acting Secretary of the Army (R. 47–48). Moreover, as to Parcel 2 of Tract No. 7, the acquisition from the beginning was, at the request of the Secretary of the Army, of the fee title (R. 56, 58–59). Appellant seizes upon the word "advisable" used in the letter of the Secretary of the Army requesting the amendment to take fee title (Pl.'s Ex. 15) and attempts thereby to deny the evident intention of the Secretary of the Army (Br. 13). This is merely a play on words. In rejecting a somewhat similar attack as to whether a letter of the Secretary of War sufficiently authorized the proceedings, the court said in *Old Dominion Co.* v. *United States,* 269 U. S. 55, 67 (1925), "We perceive no requirement that the Secretary should go further than to apply to the Attorney General. Moreover, the Secretary's letter certainly showed that he thought the suit would be advantageous to the Government, and we should be slow to suppose that the precise shade of his opinion upon the point affected the jurisdiction of the Court."

It is thus clear that the Secretary of the Army has exercised his discretion to determine that it is advisable to take fee title in this case. It is equally clear that Congress has delegated to the Secretary the au-

thority to make this determination. As the court said in *United States* v. *Meyer,* 113 F. 2d 387 (C. A. 7, 1940), certiorari denied, 311 U. S. 706 (1940) in rejecting a similar attack upon a determination that fee title should be taken under the Act of April 24, 1888, 25 Stat. 94, 33 U. S. C. sec. 591 (the very statute involved here) (p. 392):

> Defendants insist that a fee simple title was not necessary to accomplish the purposes contemplated by the legislation. But the power to decide whether such a title was needed is, by the legislation, conferred upon the Secretary and, in the absence of bad faith or abuse of discretion such determination is not subject to judicial review [many citations]. Determination of the extent, amount or title of property to be taken, by an Administrative Department, is, in the absence of bad faith, final [many citations].

More recent authorities to the same effect include *United States* v. *Carmack,* 329 U. S. 230, 247 (1946); *City of Oakland* v. *United States,* 124 F. 2d 959, 964 (C. A. 9, 1942), certiorari denied 316 U. S. 679 (1942); *United States* v. *Montana,* 134 F. 2d 194, 197 (C. A. 9, 1943), certiorari denied 319 U. S. 772 (1943); *United States* v. *6.74 Acres of Land in Dade County,* 148 F. 2d 618, 620 (C. A. 5, 1945); cf. *United States* v. *Merchants Transfer & Storage Co.,* 144 F. 2d 324, 326 (1944). The cited cases, particularly the *Montana* and the *Meyer* cases, make it clear that local law relating to proof of "necessity" is not controlling here (Cf. Br. 14–19).

II

Where the evidence of value in a condemnation proceeding is conflicting, the compensation awarded is within the range of the testimony, and there is no substantial question as to the admissibility of evidence, the award will not be set aside on appeal

A. The verdict is supported by substantial evidence

The issue of value was here determined by a jury. The verdict of the jury, and the judgment of the court based upon that verdict, are within the range of the evidence (R. 69, 74–87, Tr. 63–64, 65, 131, 184, 233–234, 305–306). It is now well-settled that in such circumstances the award will not be set aside on appeal. See e. g., *Porrata* v. *United States,* 158 F. 2d 788, 790–791 (C. A. 1, 1947); *Phillips* v. *United States,* 148 F. 2d 714, 716 (C. A. 2, 1945); *Miller* v. *United States,* 137 F. 2d 592, 594 (C. A. 3, 1943); *Foster* v. *United States,* 145 F. 2d 873, 877 (C. A. 8, 1944); *Murray* v. *United States,* 130 F. 2d 442, 444 (App. D. C. 1942); *Santa Barbara County* v. *Hollister Estate Co.,* 111 Cal. App. 564, 295 Pac. 866 (1931). Cf. *United States* v. *Hayes,* 172 F. 2d 677, 680 (C. A. 9, 1949). The language of the court in *Foster* v. *United States, supra,* is particularly appropriate here inasmuch as in the instant case as there the trial court denied a motion for a new trial by the landowner (R. 94). There the court said (145 F. 2d at p. 877):

> The value so determined by the jury was within the scope of the testimony, and hence, it is sustained by substantial evidence. We do not pass upon the weight of the evidence, and the trial court has denied defendant's motion

> for a new trial. In these circumstances, the verdicts, being supported by substantial evidence, even though there may be a conflict in the evidence, must be sustained. *Ramming Real Estate Co.* v. *United States,* 8 Cir., 122 F. 2d 892; *Love* v. *United States, supra* [141 F. 2d 981]; *O'Donnell* v. *United States,* 8 Cir., 131 F. 2d 882.

Thus, the fact that the verdict of the jury is within the scope of the evidence is sufficient for it to be deemed to be sustained by substantial evidence. However, by any standard the award in the instant case is sustained by substantial evidence. Mr. Chris R. Jones, who appellant recognizes (Br. 21) was well-qualified, testified, *inter alia,* that he had appraised property in the vicinity of the property here involved, that he had made sales of property in the area, that his firm has some 30 or 35 large subdivisions in the area, that he investigated the property in question some four or five times for the purpose of arriving at an estimate of the reasonable market value of the property (Tr. 223–224). He testified further that he investigated sales of similar property and discussed the matter with adjoining property owners (Tr. 226) and that he knew of the sale to the appellant of the property here involved (Tr. 232–233). In this background, Mr. Jones testified that the property in question had a fair market value of $6,500 which was "Approximately three hundred dollars an acre allowing a thousand dollars for the little house" (Tr. 234). Appellant's attempt (Br. 21–25) to discredit Mr. Jones' valuation by reference to his testimony on

cross-examination as to the values that would have resulted if the Government had merely taken a 15-year easement does not indicate any error as to the fair market value of the property in 1948. Instead it represents an attempt to recover the enhancement which would have resulted from the exercise of the Government's 15-year easement. Plainly, appellant has no legal claim to such enhancement.

Mr. William M. Thielbar, another well-qualified witness (Tr. 295–296, 302), testified, *inter alia,* that he had been familiar with the Simmond's property for many years, that he had made a very careful and thorough analysis of the property, that he discussed the property with several adjoining property owners; that he compared the property with other similar property in the area and investigated sales of such property (discussing a number of such similar sales in some detail); that he discussed the property with appellant's predecessor in title and that he took into consideration the sale price of the property itself (Tr. 296–297, 306–316). Mr. Thielbar testified that the fair market value of the property here involved was $350.00 an acre and that the small house built on piles (R. 67) had a value of $500.00 (Tr. 305–306). The evidence further shows that appellant purchased the very property here involved on an installment contract dated October 21, 1944, for $4,500 payable $1,100 down and $50.00 a month (Tr. 64–66.)[5]

[5] The summary of the evidence we have given clearly shows that both of the Government's valuation witnesses considered such proper bases for valuation as the physical characteristics of the land, its location, the highest and best use of the land in view of the physical characteristics and location, and sales of comparable

There was thus ample evidence to support the verdict of the jury finding the value of the land to be $375.00 per acre and the value of the improvements to be $1,250 (R. 69).

B. No error was committed in the admission of evidence of the sale price of the land four years prior to the taking

It is equally clear that appellant's contention (Br. 20) that the court erred in admitting evidence of the price appellant paid for the property is also entirely without merit. Since compensation is measured by market value, prior sales of the same property, reasonably recent and not forced, are obviously the best evidence of market value. *United States* v. *Ham,* 187 F. 2d 265, 269–270 (C. A. 8, 1951); *United States* v. *13,255.23 Acres of Land, Etc.,* 158 F. 2d 868, 876 (C. A. 3, 1945); *Baetjer* v. *United States,*

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lands in the vicinity and thus that their opinion as to the fair market value of the property concerned was not on the "primary basis" of the sale of the property to the appellant, as appellant contends (Br. 20, paragraph number 3). Moreover, it was perfectly proper to consider such prior sale in arriving at their estimates of the fair market value of the property as is shown *infra*, pp. 15–19. The record clearly disproves appellant's contention (Br. 25) that Mr. Thielbar "made no independent appraisal but relied only on the contract of sale by which appellant acquired the property and on appraisements by others." Indeed, the very portion of the testimony quoted by appellant (Br. 26) specifically shows that Mr. Thielbar formed his opinion of value on the "basis of the foundation of comparable sales" and by using his "own mind and opinion" (Tr. 367–368). Incidentally, it is noteworthy that although pursuant to stipulation the value of the property was to be determined as of November 8, 1948, but "in its physical condition as of October 21, 1944" (R. 67), appellant's witness Kenneth B. King (Br. 27–29) testified on cross-examination that "I don't know anything about it [the physical condition of the property in question] in 1944" (Tr. 142).

143 F. 2d 391, 397 (C. A. 1, 1944), certiorari denied 323 U. S. 772 (1944); *United States* v. *Becktold Co.,* 129 F. 2d 473, 479 (C. A. 8, 1942); *Franzen* v. *Chicago, M. & St. P. Ry. Co.,* 278 Fed. 370 (C. A. 7, 1921); *Forest Preserve District* v. *Hahn.* 341 Ill. 599, 173 N. E. 763 (1930); *St. Louis* v. *Turner,* 331 Mo. 834, 843, 55 S. W. 2d 942 (1932); *In re Jennings Street,* 207 App. Div. 170, 201 N. Y. S. 799, 800 (1st Dept. 1923); *In re Block Bounded by Avenue A,* 66 Misc. 488, 122 N. Y. S. 321 (S. Ct. 1910); I Nichols, Eminent Domain (2d Ed. 1917) sec. 218; II Nichols, Eminent Domain (2d Ed. 1917) sec. 454; II Lewis, Eminent Domain (3d Ed. 1909) sec. 664; Orgel, Valuation under Eminent Domain (1936) sec. 134. Cf. *Spring Val. Waterworks* v. *City, Etc., of San Francisco,* 192 Fed. 137, 165 (N. D. Cal. 1911). Local state cases are in agreement. *Union Hollywood Water Co.* v. *City of Los Angeles,* 184 Cal. 535, 538, 195 Pac. 55, 56 (1920); *Bonnarjee* v. *Pike,* 43 Cal. App. 502, 506, 185 Pac. 479, 481 (1919). In *Baetjer* v. *United States, supra,* the court said (143 F. 2d at p. 397):

> Clearly such transactions [arm's-length transactions in lands in the vicinity of those taken at about the time of taking] have a tendency to show fair market value. In fact, *in the absence of recent transactions of a like nature involving the land taken itself,* they are the best evidence of market value. [Emphasis added.]

Indeed, where the sale is between a willing buyer and a willing seller and is not so remote as to render the price of no bearing upon the present market value, it is reversible error to reject evidence of such

prior sale as proof of the value of the land. *United States* v. *Ham*, 187 F. 2d 265, 269–270 (C. A. 8, 1951); *United States* v. *Certain Parcels of Land in Philadelphia*, 144 F. 2d 626, 629–630 (C. A. 3, 1944).

As shown by the above-cited cases, a judicial discretion as to admission of evidence respecting the price paid by the owner for property taken in condemnation proceedings is vested in the trial court. The exercise of that discretion will not ordinarily be disturbed on appeal. *United States* v. *Becktold Co.*, 129 F. 2d 473, 479 (C. A. 8, 1942); *Franzen* v. *Chicago, M. & St. P. Ry. Co.*, 278 Fed. 370, 373 (C. A. 7, 1921). In the latter case the court said:

> In reference to the admission of evidence respecting * * * the purchase price of the land in question a few years preceding, the rules of law are too well settled to call for restatement. * * * whether the previous sale of the land in question * * * may or should be shown, are matters concerning which the trial judge can best decide. Recognizing that this evidence is received for the purpose of placing a jury in a better position to pass judgment upon the ultimate question of fact—the value of the land condemned and the injury to the balance—it is usual for the court to permit a rather wide range of investigation. * * * Perhaps such evidence sometimes assumes too great importance. But the trial judge is in the best possible position to decide whether the situation has been clearly and satisfactorily presented, and he has it within his reasonable discretion to order or withhold

> a view of the premises to better enable the jury to understand and weigh such evidence.

The admission of evidence of a sale of the property condemned has been sustained even though a considerable period of time elapsed between the sale and the taking. *Dickinson* v. *United States,* 154 F. 2d 642, 643 (C. A. 4, 1946) (sale in 1937 held properly admitted when taking was in 1943); *Love* v. *United States,* 141 F. 2d 981, 983 (C. A. 8, 1944) (sale in 1933 held properly admitted when taking was in 1940); *United States* v. *Becktold Co.,* 129 F. 2d 473, 479 (C. A. 8, 1942) (sale in 1925 held properly admitted when taking was in 1939). As is spelled out in the *Dickinson* and *Becktold* cases particularly, the circumstance of lapse of time between the sale and taking of the property, involving changed conditions of times, goes to the weight rather than the admissibility of the evidence. In the *Dickinson* case the court said (154 F. 2d at p. 643): "The period of time which had elapsed since the sale in 1937 was undoubtedly substantial, involving as it did the changed conditions of the times, but these circumstances went to the weight rather than the admissibility of the evidence and were the subject of comment in the argument to the jury on the appellant's behalf." The language of the court in the *Becktold* case is as follows (129 F. 2d at p. 479):

> The fact that the purchase was made some fourteen years before the date of taking the property went to the weight of the evidence, rather than to its admissibility. Metropolitan Life Ins. Co. v. Armstrong, 8 Cir., 85 F. 2d

187; Chapman & Dewey Lbr. Co. v. Hanks, 6 Cir., 106 F. 2d 482. A judicial discretion as to the admission of evidence of this character is vested in the trial court and that discretion will not ordinarily be disturbed on appeal.

III

The court's finding as to the acreage involved is not clearly erroneous

The Government contended that appellant's property amounted to 18.27 acres (Tr. 27) but appellant contends it consists of 22.65 acres (Br. 34). This discrepancy results from the fact, not mentioned by appellant, that part of the land he claims lies below low-water mark of the Sacramento River. Thus, appellant's witness Prescott agreed that there were 18 and a fraction acres of land west (that is, landward) of the low-water mark of the Sacramento River (Tr. 20–21). Appellant's claim to an additional 3 and a fraction acres relates to land under water (Tr. 3, 22, 26, 27).[6] The boundary running into the water was based upon a sheriff's deed dated 1858 (Tr. 25–26; Def's. Ex. D). As appellant recognizes (Br. 34), his title stems from a later patent from the State of California and not from the sheriff's deed. The patent described the east boundary of the property as the "bank of the Sacramento River" (Pl's. Ex. 1, Tr. 24–25). It does not appear whether the 1858 deed represents an erroneous description of the high-water mark of the Sacramento River or whether the differ-

[6] There was some disparity in the amount of the fractions which was resolved by agreement (Tr. 27).

ence is attributable to changes which have occurred since that time. Under any view, appellant does not own the 3.6 acres which are located in the bed of the river.

The Sacramento River at the point here in question is subject to tides (see E. g., Tr. 385). The Supreme Court of California has stated that "The proprietary rights of the owner of land bordering on tide water do not extend beyond the ordinary high water mark." *Boone* v. *Kingsbury,* 206 Cal. 148, 170, 273 Pac. 797, 807 (1928), certiorari denied 280 U. S. 517 (1929); Cal. Civ. Code sec. 830. Also, the Sacramento River is a navigable stream (Cal. Harbors and Navigation Code, sec. 105) and "The right of a riparian owner of land abutting on navigable water does not include the title and possession of submerged lands * * *." *Oakland* v. *El Dorado Terminal Co.,* 41 Cal. App. 2d 320, 329, 106 P. 2d 1000, 1004–1005 (1940); *Packer* v. *Bird,* 137 U. S. 661, 669 (1891). In the latter case the Supreme Court of the United States stated, "* * * we accept the view of the Supreme Court of California in its opinion as expressing the law of that State, 'that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream.' *Lux* v. *Haggin,* 69 California, 255." And in *Heckman* v. *Swett,* 99 Cal. 303, 33 Pac. 1099, 1101 (1893), the court pointed out (p. 308) that a patent by the State of swamp lands "conveyed to high water mark on the southerly bank of the river as it existed at the date of the patent, or as thereafter changed by washing or cutting away by the action of the water, or by accretions added by the

same agency." See also *Bouchard* v. *Abrahamsen*, 160 Cal. 792, 796, 118 Pac. 233, 235 (1911). Thus, passing the other weaknesses in appellant's claim,[7] it is clear that he had no legal title to the additional 3.6 acres.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the district court should be affirmed.

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OCTOBER 1951.

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[7] For example, it does not appear that the line drawn by appellant's witness was based upon or conformed to any description appearing in appellant's chain of title. Appellant's amended answer (R. 21) describes his land as bounded on the east by the Sacramento River.

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